

TENNESSEE GENERAL ASSEMBLY  
FISCAL REVIEW COMMITTEE



**FISCAL NOTE**

**HB 120 - SB 1066**

March 25, 2019

**SUMMARY OF BILL:** Enhances penalties for manufacturing, delivering, selling, or possession with intent to manufacture, deliver, or sell (possession with intent) of fentanyl, its derivatives, and its analogues.

Reclassifies current offenses based on the amount of fentanyl manufactured, delivered, sold, or possessed with intent.

Requires all Class A felony convictions for manufacturing, delivering, selling, or possessing with intent of fentanyl serve 100 percent of the sentence received.

Requires all convictions for the manufacturing, delivering, selling, or possessing with intent of fentanyl serve a mandatory 180 days.

Requires a mandatory sentence of 30 days for convictions of simple possession or casual exchange of fentanyl.

**ESTIMATED FISCAL IMPACT:**

**Increase State Expenditures – \$10,415,800 Incarceration\***

**Increase Local Expenditures – \$718,100\*\***

Assumptions:

*Reclassification of Fentanyl Offenses*

- Tennessee Code Annotated § 39-17-417 prohibits the manufacture, delivery, selling, or possession with intent of controlled substances.
- Manufacturing, delivering, selling, or possessing fentanyl is a Class C felony in any amount up to 200 grams, a Class B felony in any amount 200 grams to 2,000 grams and a Class A felony in any amount 2,000 grams or more.
- The proposed legislation makes the manufacture, delivery, sale, or possession with intent of fentanyl a Class C felony for any amount under one-tenth (0.1) of a gram, a Class B felony for any amount between one-tenth (0.1) of a gram and ten (10) grams, and a Class A felony for any amount over ten (10) grams.

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- Statistics from the Department of Correction (DOC) show an average of 610.6 admissions each year for manufacturing, delivering, selling, or possessing with intent of a Schedule II controlled substance. It is assumed that 15 percent ( $610.6 \times 0.15 = 91.6$  admissions) of these admissions are attributable to fentanyl. The classification of these offenses will be enhanced under the proposed legislation.

#### Less than One-Tenth of a Gram

- The proposed legislation classifies the penalty for manufacturing, delivering, selling, or possessing with intent of less than 0.1 grams of fentanyl and classifies the offense as a Class C felony.
- Of the 91.6 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that 100 percent of those will involve more than 0.1 grams of fentanyl and will not be enhanced.

#### One-Tenth of a Gram to Ten Grams

- The proposed legislation reclassifies manufacturing, delivering, selling, or possessing with intent of more than 0.1 grams of fentanyl but less than ten grams as a Class B felony. This offense is currently punishable as a Class C felony.
- Of the 91.6 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that 80 percent, or 73 admissions ( $91.6 \times 80\% = 73.28$ ), will involve the manufacture, delivery, sale, or possession with intent of one-tenth to ten grams of fentanyl.
- The proposed legislation will result in 73 admissions being enhanced from a Class C felony to a Class B felony.
- The average time served for Class C felony is 3.62 years; the average time served for Class B felony is 6.65 years. The proposed legislation will result in each offender serving an additional 3.03 years ( $6.65 - 3.62$ ).
- Based on population data from the U.S. Census Bureau, population growth in Tennessee averaged 0.81 percent per year for each of the past 10 years (from 2008 to 2018), yielding a projected compound population growth rate of 8.37 percent. Assuming Tennessee's population continues growing by the same rates over the next 10-year period, population growth will account for six ( $73 \times 8.37\%$ ) additional admissions for a total of 79 ( $73 + 6$ ).
- According to the DOC, 47.2 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.2 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $79 \text{ offenders} \times 47.2\% = 37 \text{ offenders}$ ).
- According to the DOC, the average operating cost per offender per day for calendar year 2019 is \$73.18.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 42 offenders ( $79 \text{ offenders} - 37 \text{ recidivism discount}$ ) serving an additional 3.03 years (1,106.71 days) at a cost of \$80,989 ( $\$73.18 \times 1,106.71 \text{ days}$ ) per offender. The cost for 42 offenders is \$3,401,538 ( $\$80,989 \times 42$ ).

### More than Ten Grams

- Of the 91.6 admissions attributed to manufacturing, delivering, selling, or possessing with intent of fentanyl, it is assumed that the remaining 20 percent, or 18 admissions ( $91.6 \times 0.2 = 18.32$ ), will involve more than ten grams of fentanyl.
- The proposed legislation will result in 18 admissions being enhanced from a Class C to a Class A felony.
- The proposed legislation requires any offender convicted of Class A felony manufacturing, delivering, selling, or possessing with intent of fentanyl to serve 100 percent of the sentence received. It is assumed that most offenders will be sentenced within Range I for a Class A felony.
- The average time served for Class C felony is 3.62 years; the lowest sentence one can receive for a Class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 11.38 years ( $15 - 3.62$ ).
- Based on population data from the U.S. Census Bureau, population growth in Tennessee averaged 0.81 percent per year for each of the past 10 years (from 2008 to 2018), yielding a projected compound population growth rate of 8.37 percent. Assuming Tennessee's population continues growing by the same rates over the next 10-year period, population growth will account for two ( $18 \times 8.37\%$ ) additional admissions for a total of 20 ( $18 + 2$ ).
- According to the DOC, 47.2 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.2 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $20 \text{ offenders} \times 47.2\% = 9 \text{ offenders}$ ).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 11 offenders ( $20 \text{ offenders} - 9 \text{ recidivism discount}$ ) serving an additional 11.38 years (4,156.55 days) at a cost of \$304,176.33 ( $\$73.18 \times 4,156.55$ ) per offender. The cost for 11 offenders is \$3,345,940 ( $\$304,176.33 \times 11$ ).
- Currently, it is a Class B felony for the manufacturing, delivering, selling, or possessing 200 grams to 2,000 grams of fentanyl.
- The proposed legislation reclassifies manufacturing, delivering, selling, or possession with intent of more than ten grams of fentanyl as a Class A felony, which requires each offender sentenced to a period of confinement to serve 100 percent of the minimum sentence received.
- Statistics from the DOC show an average of 135.2 admissions each year for Class B felony manufacturing, delivering, selling, or possessing with intent of a Schedule II controlled substance. It is assumed that 15 percent, or 20 admissions ( $135.2 \times 0.15 = 20.28$  admissions), are attributable to fentanyl.
- The proposed legislation will result in these admissions being punished as a Class A felony rather than a Class B felony.
- The average time served for Class B felony is 6.65 years; the lowest sentence one can receive for a class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 8.35 years ( $15 - 6.65$ ).

- Based on population data from the U.S. Census Bureau, population growth in Tennessee averaged 0.81 percent per year for each of the past 10 years (from 2008 to 2018), yielding a projected compound population growth rate of 8.37 percent. Assuming Tennessee's population continues growing by the same rates over the next 10-year period, population growth will account for two ( $20 \times 8.37\%$ ) additional admissions for a total of 22 ( $20 + 2$ ).
- According to the DOC, 47.2 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.2 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $22 \text{ offenders} \times 47.2\% = 10 \text{ offenders}$ ).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on 12 offenders (22 offenders – 10 recidivism discount) serving an additional 8.35 years (3,049.84 days) at a cost of \$223,187 ( $\$73.18 \times 3,049.84 \text{ days}$ ) per offender. The cost for 10 offenders is \$2,678,244 ( $\$223,187 \times 12$ ).

#### All Class A Felony Fentanyl Offenses Serving 100 Percent of Sentence Received

- The average time served for a Class A felony is 18.67 years. The lowest sentence one can receive for a Class A felony within Range I is 15 years. This analysis estimates any increase in state incarceration expenditures resulting from Class A felony fentanyl offenders serving 100 percent of sentence received will be not significant.

#### *Controlled Substances Containing Fentanyl*

- The proposed legislation enhances the manufacturing, delivering, selling, or possessing with intent of substances containing fentanyl one classification higher.
- The most commonly known substances to be laced with fentanyl are heroin, a Schedule I controlled substance, and cocaine and counterfeit prescription opioids, which are Schedule II controlled substances.

#### Cocaine and Counterfeit Prescription Opioids Containing Fentanyl

- Statistics from the DOC show an average of 610.6 admissions each year for manufacturing, delivering, selling, or possessing with intent for a Schedule II controlled substance. It is assumed that 50 percent ( $610.6 \times 0.50 = 305.3$  admissions) of these admissions are attributable to unlawful possession of cocaine or opiates.
- Of these 305.3 admissions, it is assumed that five percent, or 15 admissions ( $305.3 \times .05 = 15.27$ ), will have been convicted of possession of cocaine or counterfeit prescription opioids that contained fentanyl.
- The average time served for Class C felony is 3.62 years; the average time served for Class B felony is 6.65 years. The proposed legislation will result in each offender serving an additional 3.03 years ( $6.65 - 3.62$ ).
- Based on population data from the U.S. Census Bureau, population growth in Tennessee averaged 0.81 percent per year for each of the past 10 years (from 2008 to 2018), yielding a projected compound population growth rate of 8.37 percent. Assuming

Tennessee's population continues growing by the same rates over the next 10-year period, population growth will account for one (15 x 8.37%) additional admission for a total of 16 (15 + 1).

- According to the DOC, 47.2 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.2 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law (16 offenders x 47.2% = 8 offenders).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on eight offenders (16 offenders – 8 recidivism discount) serving an additional 3.03 years (1,106.71 days) at a cost of \$80,989 (\$73.18 x 1,106.71 days) per offender. The cost for eight offenders is \$647,912 (\$80,989 x 8).

#### Heroin Containing Fentanyl

- The proposed legislation enhances the penalty for manufacturing, delivering, selling, or possessing heroin that contains fentanyl from a Class B to a Class A felony.
- Statistics from the DOC show an average of 135.2 admissions each year for Class B felony manufacturing, delivering, selling, or possessing with intent of a schedule II controlled substance. It is assumed that 15 percent, or 20 admissions (135.2 x 0.15 = 20.28 admissions), are attributable to heroin.
- Of these 20 admissions, it is assumed that five percent, or one admission (20 x .05 = 1.01), will have been convicted of possession of heroin that contained fentanyl.
- The average time served for Class B felony is 6.65 years; the lowest sentence one can receive for a class A felony within Range I is 15 years. The proposed legislation will result in each offender serving an additional 8.35 years (15 - 6.65).
- Population growth and recidivism will not affect the fiscal impact of the proposed legislation for this group of offenders.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on one offender serving an additional 8.35 years (3,049.84 days) at a cost of \$223,187 (\$73.18 x 3,049.84 days).

#### *Mandatory Sentences*

- Tennessee Code Annotated § 40-35-303 provides that a defendant, except for one convicted of specified offenses, shall be eligible for probation if the sentence actually imposed is less than 10 years.
- An offense under Tenn. Code Ann. § 39-17-417, particularly a Class C felony offense, could result in the offender being eligible for probation.
- The proposed legislation requires offenders convicted of manufacturing fentanyl to serve a mandatory 180 days. It is assumed that one conviction per year will result in the offender serving 180 days that would not otherwise be served under current law.
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on one offender serving 180 days at a cost of \$13,172 (\$73.18 x 180 days).

- The proposed legislation requires a mandatory sentence of 30 days for convictions of simple possession or casual exchange of fentanyl. Simple possession or casual exchange is a Class A misdemeanor.
- Statistics from the Administrative Office of the Courts, show an average of 1,869 misdemeanor convictions under Tenn. Code Ann. § 39-17-418 each year over the last five years. These statistics represent convictions at the state court level. It is assumed that only ten percent of misdemeanor convictions are at the state court level. It is assumed that there are a total of 18,690 ( $1,869 / 10\%$ ) convictions per year for violations of Tenn. Ann. Code § 39-17-418.
- Two percent ( $18,690 \times .02 = 373.8$ ) of these misdemeanor convictions involved fentanyl.
- The estimated 2019 cost per inmate per day for local jails is \$64.00.
- The proposed legislation will increase local incarceration costs by \$718,080 ( $374 \text{ offenders} \times 30 \text{ days} \times \$64$ ).

#### *Controlled Substance Analogues*

- Tennessee Code Annotated § 39-17-454 prohibits any person from knowingly manufacturing, delivering, dispensing, or selling a controlled substance analogue, punishable as a class D felony for a first offense and as a class C felony for a second or subsequent offense.
- The proposed legislation requires any offense under Tenn. Code Ann. § 39-17-454 be punished the same as the actual controlled substance.
- The most common controlled substance analogues are for cocaine, methamphetamine, and fentanyl, which are schedule II controlled substances.
- Possession of these analogues will be prosecuted as a Class C felony, as it would under Tenn. Code Ann. § 39-17-417, rather than a Class D felony.
- Statistics from the DOC show an average of 5.33 admissions each year for manufacturing, delivering, selling, or possessing with intent of a controlled substance analogue.
- The average time served for a class D felony is 2.3 years; the average time served for a class C felony is 3.62 years. The proposed legislation would result in each offender serving an additional 1.32 years.
- Population growth will not impact these admissions.
- According to the DOC, 47.2 percent of offenders will re-offend within three years of their release. A recidivism discount of 47.2 percent has been applied to this estimate to account for the impact of offenders who would re-offend under current law within the additional time added by this legislation. It is assumed that the re-offender would have committed the subsequent offense at the same felony level as under current law ( $5 \text{ offenders} \times 47.2 = 2 \text{ offenders}$ ).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on three offenders ( $5 \text{ offenders} - 2 \text{ recidivism discount}$ ) serving an additional 1.32 years (482.13 days) at a cost of \$35,282 ( $\$73.18 \times 482.13 \text{ days}$ ) per offender. The cost for three offenders is \$105,846 ( $\$35,282 \times 3$ ).

*Total State Incarceration Costs*

- The total increase in state incarceration costs will be \$10,415,839 (\$3,401,538 + \$3,345,940 + \$2,678,244 + \$647,912 + \$223,187 + \$13,172 + \$105,846).

*\*Tennessee Code Annotated § 9-4-210 requires an appropriation from recurring revenues for the estimated operation cost of any law enacted after July 1, 1986 that results in a net increase in periods of imprisonment in state facilities. The amount appropriated shall be based upon the highest cost of the next 10 years.*

*\*\*Article II, Section 24 of the Tennessee Constitution provides that: no law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.*

**CERTIFICATION:**

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in black ink that reads "Krista Lee Carsner". The signature is written in a cursive, flowing style.

Krista Lee Carsner, Executive Director

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